IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 190

JAMES TURNER,

Petitioner,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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Reference to Opinions Below

This matter was tried in the United States District Court for the District of New Jersey before the Honorable Reynier J. Wortendyke, Jr., U.S.D.J., and a jury. On appeal, the United States Court of Appeals for the Third Circuit affirmed the jury's verdict of guilty in an opinion reported at 404 F. 2nd 782 (1968).

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on December 10, 1968. (A. 30) The jurisdiction of this Court is conferred by the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C. §1254 (1). A timely Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit was granted by this Court on June 2, 1969.

Statutes Involved

1. Title 21, United States Code, Section 174 reads as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954) the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

"For provision relating to sentencing, probation, etc., see section 7237 (d) of the Internal Revenue Code of 1954. Feb. 9, 1909, c. 100, §2 (c), (f), 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, §1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657; Nov. 2, 1951, c. 666, §§1, 5 (1), 65 Stat. 767; July 18, 1956, c. 629, Title I, §105, 70 Stat. 570."

2. Title 26, United States Code, Section 4704 (a) reads as follows:

"(a) It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

"(b) The provisions of subsection (a) shall not apply—

(1) To any person having in his or her possession any narcotic drugs or compounds of narcotic drug which have been obtained from a registered dealer in pursuance of a written or oral prescription referred to in section 4705 (c) (2), issued for legitimate medical uses by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4722;

and where the bottle or other container in which such narcotic drug or compound of a narcotic drug may be put up by the dealer upon said prescription bears the name and registry number of the druggist, and name and address of the patient, serial number or prescription and name, address and registry number of the person issuing said prescription; or

(2) To the dispensing, or administration, or giving away of narcotic drugs to a patient by a registered physician, dentist, veterinary surgeon or other practitioner in the course of his professional practice, and where said drugs are dispensed or administered to the patient for legitimate medical purposes, and the record kept as required by this subpart of the drugs so dispensed, administered, distributed, or given away.

"Aug. 16, 1954, c. 736, 68A Stat. 550; Aug. 31, 1954, c. 1147, §8, 68 Stat. 1004."

Questions Presented

1. Does the provision of 21 U.S.C. §174 stating that possession of a narcotic drug shall be sufficient evidence to authorize conviction thereunder unless the defendant explains such possession to the satisfaction of the jury, unconstitutionally invade the defendant's privilege against compulsory self-incrimination?

2. Does the provision of 26 U.S.C. §4704 (a) stating that absence of taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of said subsection by the person in whose possession the drugs may be found, unconstitutionally invade the privilege against compulsory self-incrimination?

Statement of the Case

Defendant was convicted on two counts of an indictment charging violation of certain sections of the Narcotic Drug Import and Export Act (A. 7, 8), and on two counts alleging violations of certain sections of the Internal Revenue Code. (A. 7, 8) Defendant was sentenced to a total of twenty years in prison. (A. 23, 24)

Convictions were for unlawfully receiving, concealing and facilitating transportation and concealment of narcotic drug knowing said drug to have been fraudulently imported into the United States; purchasing, possessing, dispensing and distributing narcotic drug not in or from original stamped package.

The Government offered no evidence which would tend to show that the drugs possessed by the defendant were illegally imported; that the defendant had knowledge that the drugs were illegally imported; or that he did not purchase the drugs in or from their original stamped package. Instead, the case went to the jury on the presumptions embodied in Sections 174 and 4704 (a). The defendant did not testify in the case.

The convictions were affirmed by the United States Court of Appeals for the Third Circuit (A. 30) which rejected defendant's argument that the provisions in question unlawfully invade the privilege against self-incrimination.

Summary

The presumption embodied in 21 U.S.C. §174, by exacting a penalty for exercising the privilege against compulsory self-incrimination, places an unconstitutional burden on that privilege within the principles of law announced in the recent opinions in *Griffin* v. *California,* 380 U.S. 609 (1965) and *United States* v. *Jackson,* 390 U.S. 570 (1968). The burden arises because the presumption operates on evidence of possession of narcotic drugs—which is not forbidden by the statute and which, without the presumption, is insufficient for conviction—and constitutes it sufficient evidence for conviction of unlawful importation or knowingly dealing in unlawfully imported narcotic drugs unless the defendant shall explain such possession to the satisfaction of the jury. In such circumstances accused loses his unfettered discretion to invoke or waive the privilege against compulsory self-incrimination.

Possession of narcotic drugs without taxpaid stamps thereon is, pursuant to 26 U.S.C. §4704 (a), prima facie evidence of the conduct prohibited by the subsection. But possession of such drugs, without more, is not the conduct prohibited. And the Congressional declaration that possession may be so construed impermissibly restricts the privilege against compulsory self-incrimination in the same manner as does the aforesaid presumption.

ARGUMENT

The Provision of 21 U.S.C. §174 Stating That Possession of a Narcotic Drug Is Sufficient Evidence to Authorize Conviction Thereunder Unless the Defendant Explains Such Possession to the Satisfaction of the Jury Is Unconstitutional Because It Discourages the Exercise of the Right Against Compulsory Self-Incrimination.

21 U.S.C. §174 basically proscribes, in broad and sweeping terms, illegally importing narcotic drugs into the United States and dealing in drugs knowing of their illegal importation. It does not purport to forbid mere possession. However, by legislative fiat evidence of possession is tantamount to evidence of the proscribed conduct.

The privilege against compulsory self-incrimination is "as broad as the mischief against which it seeks to guard," *Counselman* v. *Hitchcock,* 142 U.S. 547, 562 (1892) and ". . . the privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy* v. *Hogan,* 378 U.S. 1, 8 (1964); *Miranda* v. *Arizona,* 384 U.S. 436 (1966). A privilege of these dimensions is denied to one accused under this statute. It is patently foolish to assert that, faced with the knowledge that his silence would lead to the instruction actually given pursuant to the presumption (A. 15, 16), petitioner herein was able to invoke or waive his privilege "in the unfettered exercise of his own will." And just as clearly the fact that petitioner did not testify does not indicate proper observance of his constitutional right in view of the penalty exacted. That penalty is embodied in the charge given to the jury

that ". . . there is no such evidence as that called for" (A. 16) by the presumption in question.

The operation of the presumption is not constitutionally authorized by analogy to the situation where ". . . a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence" as suggested by *Yee Hem* v. *United States,* 268 U.S. 178, 185 (1925), on which the opinion below primarily relied. There was no evidence of unlawful importation or petitioner's knowledge thereof presented (A. 26). The existence of these basic elements of the crime was inferred from the presumption embodied in Section 174 and not from the "force of circumstances," *Yee Hem, supra,* erected by direct or indirect factual evidence. "It is clear beyond doubt that the fact of possession alone is not enough to support an inference that the possessor knew it had been imported." *Leary* v. *United States,* 23 L. Ed. 2nd 57, 37 United States Law Week 4397, 4411 (1969) (concurring opinion of Justice Black).

It is no answer to say that accused need not himself testify but can adduce testimony from others. If the reason for the presumption is that the government cannot be expected to discover that which is known only to the defendant, then it is clear that defendant must testify and cannot rely on the testimony of others. And, if the reason be that the accused alone knows who can testify to circumstances absolving him of the crimes charged, the government can find such witnesses with proper investigation. As was so forcefully noted by Justice Black dissenting in *United States* v. *Gainey,* 380 U.S. 63, 83, 94 (1965):

". . . Instead of supporting the constitutionality of such a use of statutory presumptions, however, I think this

> argument based on necessity and convenience points out its fatal defects. I suppose no one would deny that the Government's burden would also be made lighter if the defendant was not represented by counsel, compare Gideon v. Wainwright, 372 U.S. 335, 9 L ed 2nd 799, 83 S. Ct. 792, 93 A.L.R. 2d 733, or if the jury could receive and consider confessions extorted by torture, compare Brown v. Mississippi, 297 U.S. 278, 80 L ed 682, 56 S. Ct. 461, or if evidence obtained from defendants through illegal searches and seizures could be used against them, compare Mapp v. Ohio, 367 U.S. 643, 6 L ed 2d 1081, 81 S. Ct. 1684, 84 A.L.R. 2d 933, but this Court has not hesitated to strike down such encroachments on those constitutional rights. . . ."

As this Court has had occasion to say, there is an alternative to the presumption of guilt that may be drawn from the silence of accused:

> It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand. *Wilson* v. *United States,* 149 U.S. 60, 66 (1893).

In *Griffin* v. *California,* 380 U.S. 609 (1965), this Court considered a rule of evidence pursuant to which the State could mention to the jury for its consideration the failure of the accused to testify. The rule was held unconstitu-

tional because "It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." 380 U.S. at 614. In this case the "penalty" is imposed by the statute rather than by the Courts but this distinction is irrelevant for the *Griffin* decision turned on the result, rather than the source, of the penalty imposed for the exercise of the privilege against compulsory self-incrimination. It is equally true here that a price was exacted for defendant's silence. *Griffin* alone requires reversal of the decision below.

That portion of the Federal Kidnapping Act which provided for the death penalty if the verdict of the jury so recommended was before this Court in *United States* v. *Jackson*, 390 U.S. 570 (1968). This Court voided that portion of the Act because:

> . . . The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional. 390 U.S. at 581.

The Court went on to say:

> . . . The evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to

> impose an impermissible burden upon the assertion of a constitutional right. (Emphasis in original.) 390 U.S. at 583.

The privilege against compulsory self-incrimination is no less precious than the right to plead not guilty and the right to a trial by jury. It is entirely appropriate to apply the same rationale to this case. The presumption embodied in 21 U.S.C. §174 likewise "chills" the exercise of a constitutional right and "encourages" its abandonment. The conclusion is inescapable that the *Jackson* decision requires reversal.

It is also noteworthy that in *Griffin* accused remained silent as in *Jackson* defendant entered a plea of not guilty and demanded a trial by jury. Thus the fact that petitioner herein remained silent and his privilege against compulsory self-incrimination was accorded him to that narrow and constitutionally deficient extent does nothing to take this case from principles of law announced in the cited authorities.

It is enough to say of *United States* v. *Armone,* 363 F. 2nd 385 (2nd Cir.), cert. den. 385 U.S. 957 (1966) and *United States* v. *Gainey,* 380 U.S. 63 (1965) upon which the opinion below relies that both were decided prior to *United States* v. *Jackson, supra,* and that neither considered or decided the question now before the Court.

The Provision of 26 U.S.C. §4704 (a) Stating That Absence of Taxpaid Stamps From Narcotic Drugs Shall Be Prima Facie Evidence of a Violation of Said Subsection by the Person in Whose Possession the Drugs May Be Found Is Likewise Unconstitutional Because It Discourages the Exercise of the Right Against Compulsory Self-Incrimination.

26 U.S.C. §4704 (a) prohibits the purchase, sale, dispensing or distribution of narcotic drugs except in or from the original stamped package. Certainly, under the statute, possession of narcotic drugs without taxpaid stamps is not necessarily unlawful. But, as in the case of 21 U S.C. §174, mere possession, clearly insufficient evidence for a conviction, may be, by Congressional mandate, without more, the basis of a conviction for violation of the subsection in question.

Although the wording of this subsection differs from that of the presumption discussed earlier, the effect is the same. The Court charged the jury, after reading the statute in question to them, in effect, that if the drugs "were in the possession or under the control" (A. 19) of petitioner a verdict of guilty could be returned. At trial, petitioner was aware that proof of possession, although not sufficient evidence without more to convict, would entitle the government to the charge just recited. As a result, he was obviously unable to invoke or waive his privilege against compulsory self-incrimination "in the unfettered exercise of his own will." *Malloy* v. *Hogan, supra; Miranda* v. *Arizona, supra.*

The restriction thus imposed on his constitutional privilege was rooted directly in the statute and was not the only

inference to be drawn from the factual evidence available to the jury. Such burden is not constitutionally permissible by reason of necessity and amounts to a penalty imposed for exercising a right as did the rule abrogated in *Griffin* v. *California, supra,* and has a substantial tendency to discourage assertion of the privilege and needlessly encourage a waiver thereof as did the statutory provision put aside in *United States* v. *Jackson, supra.* As before, the last cited cases inescapably lead to a reversal in the present case. Earlier cases relied on by the Court below in rejecting this constitutional challenge are not controlling as they did not consider the precise question involved here.

Conclusion

Petitioner, therefore, respectfully urges this Court to set aside and reverse his convictions on all counts of the indictment.

Respectfully submitted,

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